

Internal Revenue Service

**memorandum**

CC:TL:Br3

GEBowden

date: JUN 15 1988

to: Laguna Niguel District Counsel W:LN  
Attn: Patrick Lucas

from: Director, Tax Litigation Division CC:TL

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subject: Request for Technical Advice Notice 86-16

Your memorandum dated May 10, 1988 requested technical advice.

ISSUES

1. Given the statutory language of I.R.C. § 4101(b), may the Service require a bond of registrants prior to the promulgation of regulations respecting § 4101(b)?

2. If the Service receives a bond pursuant to § 4101(b), may such a bond be used to satisfy past due excise tax liabilities?

CONCLUSIONS

1. A bond may be required of registrants prior to the promulgation of regulations under § 4101(b).

2. Although a colorable argument may be made to support the application of such a bond to past due excise tax liabilities, such a tactic has a substantial litigation hazard and is not recommended.

ANALYSIS

Section 4101(b) provides that "Under regulations prescribed by the Secretary, every person who registers under subsection (a) may be required to give a bond in such sum as the Secretary determines." A prima facie analysis would suggest that absent regulations this bond requirement may not be imposed.

However, because registration is at the discretion of the Secretary, we believe that the Service may deny registration to persons who refuse to give a bond. The possibility of such a denial is implied by Treas. Reg. § 48.4101-1 which refers to approval of an application for registration being necessary. Notice 87-83, 1987-51 I.R.B. 14 and Notice 88-16, 1988-7 I.R.B. 51 provide taxpayers with ample notice of our intent to impose

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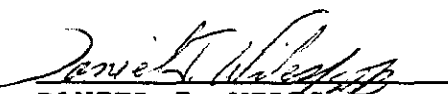
this requirement as of March 31, 1988. Since such a requirement matches congressional intent as expressed in the statute, it seems unlikely that this action could be considered an abuse of discretion.

As to the second issue, we believe that the use of the bond for past due excise taxes can be justified as consistent with the congressional intent of increased compliance in amending this statute. General Explanation of the Tax Reform Act of 1986, prepared by the Staff of the Joint Committee on Taxation, p. 1337 (P-H). It would appear to be inconsistent to hold a bond for future compliance while the taxpayer is in arrears for past taxes of the same nature as those secured by the bond. Additionally, the proposed temporary regulations, Treas. Reg. § 48.4101-2T(e)(1), require as a condition of the bond that the principal will pay any liability for tax.

However, the statute has an effective date expressed as "for gasoline removed after Dec. 31, 1987." This has been delayed until March 31, 1988 by virtue of Notice 87-83, supra. There appears to be a substantial hazard that a court would determine that the bond may only be applied to gasoline excise tax coming due after the effective date. Accordingly we do not recommend that the bond be applied to taxes arising before the effective date, other than as a last resort. Instead we suggest that registration be denied to taxpayers who are clearly past due in their excise tax.

In summary, we believe that the Service is entitled to impose the bond requirement of § 4101(b) pending the promulgation of the regulations. While using the bond to satisfy past due excise tax seems legally justifiable, we do not recommend it, other than as last resort.

MARLENE GROSS

By:   
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